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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO._____

FREDDIE GOLD and Wife, GOLDIE GOLD,

Petitioners,

v.

NATIONAL SAVINGS BANK
OF THE CITY OF ALBANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

Charles G. Black
Attorney for Petitioners
Suite 2901, 100 North Main Building
Memphis, Tennessee 38103
(901) 525-4618

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was any material or substantial evidence presented so as to raise a material issue of fact from which the jury might have rationally found a verdict in favor of GOLD in answering the special interrogatory which required a finding that Architect Ronald R. Rucinski had committed fraudulent acts, or acts so obviously unjust as to imply bad faith or gross neglect when he made his determination that the Overton Square Apartment complex was not constructed in accordance with the plans and specifications submitted to BANK and was not constructed in a good and workmanlike manner.

GOLD answers "Yes."

2. Whether there was any material or substantial evidence presented so as to raise a material issue of fact to allow the Court to instruct the jury that "fraud on the part of Rucinski would exist if the proof showed that he was in collusion with the BANK to reject the loan upon a deceitful basis."

GOLD answers "Yes."

3. Whether the Court committed error in stating as an example of fraud, collusion between Architect Ronald R. Rucinski and BANK when there was no showing of any such collusion and no allegations of such collusion.

GOLD says that Court did not commit error.

4. Whether there was any material or substantial evidence presented so as to raise a material issue of fact

from which the jury could have found special damages.

GOLD answers "Yes."

5. Did the Court wrongfully grant BANK'S judgment notwithstanding the verdict of the jury as to punitive damages?

GOLD answers "Yes."

With respect to Question 5, GOLD respectfully insists that from the very nature of the interrogatory submitted to the jury and the facts in this case, the award of punitive damages to GOLD is justified. Said interrogatory is as follows:

> Special Interrogatory: Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were not constructed in accordance with the Plans and Specifications and were not constructed in a good and workmanlike manner, fraudulent or so obviously unjust as to imply bad faith or gross neglect?
>
> _____ Yes _____ No

The jury correctly answered "Yes."

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NATIONAL SAVINGS BANK
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PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 13, 1981.

OPINION BELOW

The written opinion of the United States Court of Appeals for the Sixth Circuit appears in the Appendix, which case is reported in 641 F.2d 430 (6CA, 1981).

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was any material or substantial evidence presented so as to raise a material issue of fact from which the jury might have rationally found a verdict in favor of GOLD in answering the special interrogatory which required a finding that Architect Ronald R. Rucinski had committed fraudulent acts, or acts so obviously unjust as to imply bad faith or gross neglect when he made his determination that the Overton Square Apartment complex was not constructed in accordance with the plans and specifications submitted to BANK and was not constructed in a good and workmanlike manner.

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>
> _____ Yes _____ No

The jury correctly answered "Yes."

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on February 13, 1981, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28, United States Code Annotated, Section 1332, and Rule 19(1) (b) of the Supreme Court of the United States Revised Rules.

STATEMENT OF THE CASE

This is a diversity action which arises out of a breach of agreement by Defendant, National Savings Bank of the City of Albany (BANK) to provide Plaintiffs, Freddie Gold and Wife, Goldie Gold (GOLD), a permanent loan.

As stated in the Pre-Trial Order, GOLD contends that the refusal of BANK to finance the project because the project was not constructed in a workmanlike manner was a frivolous and unfounded charge by BANK, and that the actions of BANK were fraudulent or so obviously unjust as to imply bad faith or gross neglect; and, further, that the actions performed by BANK were committed with malice, wantonness, or oppression, and GOLD prayed for punitive damages in addition to actual damages, as a result of the wrongful refusal of BANK to comply with its permanent loan commitment.

On March 6, 1973, GOLD made application to Percy Galbreath and Son, Inc. (GALBREATH) to borrow Three Hundred Thousand ($300,000.00) Dollars for the purpose of erecting an apartment complex at 1230 Overton Park Avenue, Memphis, Tennessee, the interest rate to be 8¾%.

In the same month, BANK agreed to buy the Three Hundred Thousand ($300,000.00) Dollar construction loan from GALBREATH, to be paid by GOLD over a twenty-seven-year period of time.

Paragraph 4 of the agreement between BANK and GOLD states, among other things, that BANK "... shall also have the option of designating our own representative for the purpose of inspecting the construction of the apartment building and other improvements, and

his determination as to whether such construction has been performed in accordance with the plans and specifications and as to whether such construction is in good and workmanlike manner shall be final and conclusive."

Thereafter, a construction loan agreement was entered into between GOLD and GALBREATH, which agreement provided, among other things, for the method of distributing the Three Hundred Thousand ($300,000.00) Dollars to GOLD when percentages of the construction were completed; i.e., 1.6% to be paid to GOLD when the footing was completed, 1.6% to be paid to GOLD when the foundation was completed, et cetera.

Because of inclement weather and other problems, the completion date was extended by GOLD and BANK several times, and the last extension date was November 29, 1974, which was granted conditioned upon increasing the interest rate to 9¼%.

The Constitution of the State of Tennessee limits interest rates to 10%. Arkansas and Montana are the only two other states in the Union that had this constitutional limitation on interest rates. Recognizing that Tennessee banks were seriously, adversely affected by this limitation of interest rates, a bill was introduced in the Congress by Tennessee Senator Brock; and after extended hearings before various committees in the Congress, on September 9, 1974, the United States passed a bill styled "Debt Obligations and Usury Ceiling Bill," which was Senate Bill Number 3838.

On October 8, 1974, the Senate Bill was sent to a conference committee comprising members of the United States Senate and the United States House of Representatives, and on October 11, 1974, this Bill passed both

Houses of the Congress and was signed by the President of the United States on October 28, 1974. This legislation authorized national banks to charge up to 5% above the discount rate, as established by the Federal Reserve System, with a limitation of 13½%, irrespective of the constitutional provisions of Tennessee restricting interest to 10%.

When GOLD proceeded to Albany, New York, to take the deposition of Vice President James R. Boubin, he learned that Boubin was in charge of the loan committee of BANK. In his sworn testimony, Mr. Boubin stated that he never heard of the "Brock Bill," and that BANK was not in any way affected by the application of the Brock Bill. This was an incredible statement to be made by a loan officer of a large bank, who, to a large measure, was responsible for the bank making or losing money, as he is the person responsible for establishing the interest rates to its borrowers. Later, he admitted that BANK, being an insured bank by the Federal Deposit Insurance Corporation, was governed by the provisions of the Brock Bill; and, later, he and President Fred Peters admitted that BANK subscribed to a bank publication which devoted a whole page to the application of the Brock Bill.

Several witnesses testified at the trial that from early 1973 until 1975, the state of the United States economy was in a serious recession. Interest rates were going up; foreclosures were more frequent, and even BANK testified, through its President and Vice President, that it was not making any further loans during this period of time.

GOLD alleges that during this critical period of time, BANK was awaiting the outcome of Senate Bill Number 3838, which entitled it to charge this higher interest

rate; and when it became apparent that on October 11, 1974, the Senate would pass the bill, BANK, through its President and Vice President, came to Memphis to inspect the property, and they immediately stated, in the presence of officers of GALBREATH and representatives of GOLD, that BANK would not buy this loan from GALBREATH, because there had been change in circumstances, location, and other complaints. Vice President Boubin, although later denying that he said so, stated that he and President Peters discussed the location of the apartment complex when they were on the airplane returning to Albany, New York. GOLD contends, among other things, that Boubin was objecting to "location" because the neighborhood had become integrated.

In several telephone conversations between Vice President Boubin and representatives of GALBREATH, GALBREATH'S President, Denson A. Ward, and Vice President, Frank M. Crump III, proceeded to New York to have meetings with officers of BANK, at which meetings Boubin advised GALBREATH people that there were only five objectionable items to this project, which could have readily been corrected, as testified to by GALBREATH'S officers; and even though the commitment had been extended to November 29, 1974, BANK refused to permit GOLD to correct whatever deficiencies that BANK complained of, GALBREATH'S officers stated at all times that if there were any deficiencies, the subcontractors were responsible to correct such deficiencies. GALBREATH'S officers invited officers of BANK to return and inspect the property, which they refused to do. Instead, BANK sent an architect, Ronald R. Rucinski, to Memphis to inspect the property, and Architect Rucinski came up with forty-seven alleged deficiencies in the construction of the apartment complex.

In GOLD'S cross-examination of Architect Rucinski, it was brought out that in the deposition taken of Mr. Rucinski in New York he stated that he recorded these forty-seven deficiencies without having seen the plans and specifications. However, Mr. Rucinski denied that was what he intended in his live testimony.

It is to be emphasized that President Peters and Vice President Boubin had already stated, without equivocation, that BANK was not going to buy this loan from GALBREATH, and before Mr. Rucinski was sent down to inspect the premises.

Minutes of the mortgage committee meeting indicated that on October 18, 1974, "The current policy is that the bank is not accepting mortgage application at this time, with certain exceptions."

Trial Exhibit 37 is a memorandum of Frank Crump's telephone conversation with Mr. Boubin, who stated that BANK was making "no more loans, even at higher rates, due to money going out." Trial Exhibit 38 is a memorandum of Mr. Crump's conversation with Mr. Boubin, in which Mr. Boubin tells Mr. Crump that Fred Peters was "not able to fund loan."

On November 14, 1974, the mortgage committee meeting minutes indicated that the committee decided that the loan would not be purchased. Although it was denied by Vice President Boubin, it is apparent from his testimony and the testimony of Mr. Rucinski that Boubin sent Rucinski to Memphis to "back him up" in the BANK'S refusal to purchase the loan.

Mr. Boubin stated under oath in his deposition in New York and on the witness stand that he never approved any variations from the plans and specifications,

when the record is replete with testimony of GALBREATH'S Ward, Crump, and Church that the BANK did approve variations from the plans and specifications.

In preparation for the trial, Mr. Rucinski, at the instructions of Mr. Boubin, came to Memphis and stayed several days during the trial to testify and during stormy and wet weather went to the project and with trick photography made fifty-seven Polaroid pictures of the most inconsequential importance to the construction of the apartment complex. Further, Mr. Rucinski said that he was not aware of GOLD'S right to vary the plans and specifications, which had been approved by GALBREATH and by BANK.

Mr. Rucinski testified that the property was not constructed in a good and workmanlike manner; Frank Lansky testified just the opposite, as did Denson Ward, Roger Church, and Frank Crump, all stating that the BANK should have bought this loan; and if there were any objections to the construction, they could have all been corrected and could have been corrected before the termination of the commitment, to wit: November 29, 1974.

Permit Petitioners to quote brief excerpts from the Court's colloquy with Respondent Bank's counsel as follows:

> Then, it graduated upward to almost ten percent in the latter part of 1974. A. That is correct, yes. (App. 149)

The credibility of Boubin was successfully challenged by the Court in overruling BANK'S objections, particularly in view of the "evasive" way in which Boubin responded to GOLD'S questions on the witness stand.

MR. PIOVARCY: Well, Your Honor, the whole law suit—That is a project where you have a commitment that says that the architect's inspection would be final and conclusive and the case law is clear that unless they can show some fraud that it is not a question of what this witness says, it goes beyond that.

THE COURT: I don't agree with that. We have a definite question as to whether it was done in a good and workmanlike manner and I don't believe it is simply a question of your architect's opinion. I think that particularly in the light of your witness' or your client's testimony yesterday. I think they do definitely have a question of a good and a workmanlike manner.

MR. BLACK: And another thing, if the Court please, what it says is that they have a right to send somebody to inspect it.

THE COURT: I know it.

MR. MARSTON: And it does say it is final and binding; that is what the contract says.

THE COURT: All right, but it doesn't say that you get to hire an architect to support an opinion. We already have a conflict and I think a wrong impression was made on the basis (App. 166) of *Mr. Boubin's testimony yesterday and his evasiveness and other things.*

On the trial of the cause, the Honorable Robert McRae, Jr., Judge submitted one special interrogatory to the jury as follows:

Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were not constructed in accordance with the Plans and Specifications and were not constructed in a good and workmanlike manner,

fraudulent or so obviously unjust as to imply bad faith or gross neglect?

Yes _____ No _____

The jury answered the special interrogatory "Yes."

The Court then instructed the jury on the issue of compensatory damages and punitive damages. The jury returned a verdict in favor of GOLD in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars compensatory damages and Fifty Thousand ($50,000.00) Dollars punitive damages.

BANK filed a motion for a judgment nothwithstanding the verdict or, in the alternative, motion for new trial based upon several grounds as recited therein.

Initially, the Trial Court entered an amended judgment allowing a remittitur of One Hundred Thousand ($100,000.00) Dollars of the Two Hundred Thousand ($200,000.00) Dollar total judgment and awarded no punitive damages.

After additional briefing and a non-evidentiary hearing, the Trial Judge entered a final corrected judgment granting a Fifty Thousand ($50,000.00) Dollar remittitur of the One Hundred Fifty Thousand ($150,000.00) Dollar jury award of compensatory damages and granting a judgment notwithstanding the verdict as to the issue of punitive damages.

BANK timely filed its notice of appeal as to the jury's determination on the special interrogatory and as to the award of damages in any amount. GOLD did not appeal the remittitur of Fifty Thousand ($50,000.00) Dollars but timely filed its cross-appeal as to the Trial

Court's decision to grant a judgment N.O.V. with respect to the punitive damages awarded by the jury.

REASONS FOR GRANTING THE PETITION

Petitioners contend that there was ample and material proof to sustain the allegations that the apartment building was constructed in accordance with the plans and specifications, and that the jury was correct in concluding that the actions of the architect were "... fraudulent or so obviously unjust as to imply bad faith or gross neglect."

The Court of Appeals reversed the District Court and stated that the Court should have granted defendant's motion for judgment n.o.v. with respect to the award of compensatory damages and affirmed the decision of the Trial Court while granting judgment n.o.v. on the question of punitive damages.

The Court went on to state that in diversity cases the Federal Courts are bound by state law in determining whether there is sufficient evidence to support a jury's verdict (citing cases.) The Court of Appeals, however, in its Footnote Number 3 to its opinion on Page 8, stated that there is currently a circuit split on the issue of whether federal or state law controls in diversity cases when determining if sufficient evidence has been presented to withstand a motion for judgment n.o.v. and cited cases.

The Court of Appeals went on to say, however, that there was no probative evidence of fraudulent intent on the part of the defendant and cited various Sixth Circuit and Tennessee cases stating that there must be substantial and material evidence from which the jury could have based a verdict for the prevailing side.

In the case of *Wratchford* v. *S. J. Groves & Sons Company*, 405 F.2d *1061* (4CA, 1969), *the Court stated that where federal jurisdiction is based upon diversity, federal standard is to be applied by Court in determining sufficiency of evidence to go to jury.* The Court went on to state as follows:

> *The Supreme Court has left undecided the question of the standard to determine the sufficiency of the evidence to go to the jury in a diversity case brought in the federal court.*

The Court went on further to state:

> *The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.*
>
> * * *
>
> *An equally grave disruption of the federal system would result from the application of state law rules as to the sufficiency of evidence to go to the jury. Indeed, it has been suggested, not without reason, that the Seventh Amendment commands application of federal rather than state law here. Faith in the ability of a jury, selected from a cross-section of the community, to choose wisely among competing rational inferences in the resolution of factual questions lies at the heart of the federal judicial system. That faith requires consistency within the system and does not permit the accommodation of more restrictive state laws.*

Again, in the case of *Boeing Company* v. *Shipman*, 411 F.2d 365, 369, 370 (5CA, 1969), the Court stated

that it is well settled in this circuit that in diversity cases Federal Courts apply a federal rather than a state test for the sufficiency of evidence to create a jury question. The Court went on to state as follows:

> In *Planters*, supra, Judge Tuttle exhaustively discussed this issue and pointed out (380 F.2d at 870-871) that *although the Supreme Court had not yet resolved the question in favor of the federal test*, that Court had said in Byrd v. Blue Ridge Rural Electric Cooperative, (citing cases):
>
> > "It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."
> >
> > * * *
>
> Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve "the essential character" of the federal judicial system. Of course, we do not contend that this control will not affect state-created substantive rights in some cases. Ultimately, however, the integrity of our fact-finding processes must outweigh considerations of uniformity.

In the case of *Eckles* v. *Sharman*, 548 F.2d 905, 909 (10CA, 1977), the Court stated:

> We have repeatedly held that a verdict may not be directed unless the evidence all points one way and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is made.

In the case of *Duchesne* v. *Sugarman*, 566 F.2d 817, 829, (2CA, 1977), the Court stated:

> The test to be applied when a motion to direct a verdict has been granted is as follows:

> "The motion (should) be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment would not arrive at a verdict against him (citing cases)."

In the case of *Gauck* v. *Meleski*, 346 F.2d 433, 436 (5CA, 1965), the Court, in reversing the Trial Court's granting of a summary judgment, stated as follows:

> It is our conclusion that, according to Rule 56(e) as amended, the trial court can, and indeed should, assess the evidence presented upon the motion for summary judgment to determine its admissibility and to ascertain whether all the admissible evidence creates a genuine, material dispute of facts. *The trial court should be very careful, however, to avoid assessing the probative value of any evidence presented to it, for this would be an unwarranted extension of the summary judgment device. Assessment of the probative value of evidence is properly the function of the jury or the judge sitting as a trier of facts.*

In the case of *Anderson* v. *Hudspeth Pine, Inc.*, 299 F.2d 874, 876 (10CA, 1962), the Court stated:

> With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed.

Supreme Court Rule 17 provides that a review on writ of certiorari is not a matter of right, but a judicial discretion, and will be granted when only there are special and important reasons therefor. This rule indicates the character of reasons that the Court will con-

sider, among other things, that when a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. Subparagraph (c) also states that when a Federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, certiorari may be granted.

Petitioners refer the Court to the cases of *St. Paul at Chase Corporation, et al* v. *The Manufacturers Life Insurance Company, et al*, 278 A.2d 12; Md. C.A., May 17, 1971; 262 Md. 192; and *Selective Builders, Inc.* v. *Hudson City Savings Bank*, 349 A.2d 564, decided by the Superior Court of New Jersey on December 2, 1975. The facts of these two cases are in close analogy to the facts in the instant case.

The *St. Paul* case was an action arising out of defendant corporation's cancellation of commitment it had made for permanent financing of an apartment building to the plaintiff. Like the instant case, the loan committee contained a provision that the insurance company required a report from its architect that the apartment complex had been completed in accordance with the plans and specifications, and that the insurance company had to approve the same. Like the instant case, Manufacturers sent a photographer to photograph the building to substantiate its position that the apartment building was not substantially completed, and this is what the Court stated:

> *You can bet your bottom dollar if there was substantial evidence of incompletion of the project on*

the remaining floors other than the first floor, there would have been photographs of that state of incompleteness. He had been asked by Weaver, according to his own testimony, to take photographs showing what had not been completed.

* * *

I am persuaded beyond any doubt that the reason for the cancellation of this contract was, first, a calculated risk taken by Manufacturers that if it didn't accept the roll over, and if the construction mortgage were foreclosed, and if Manufacturers were sued, that it could weather the storm, either by avoiding liability completely, or if subjected to liability, by minimizing damages. They took that calculated risk, and they're stuck with the result.

CONCLUSION

Petitioners respectfully submit to this Court that, there being a diversity of opinions with respect to the quantum and degree of proof in the various Federal Courts of Appeals, this case is a proper case for this Honorable Court to grant Petitioners' application for a writ of certiorari to the Sixth Circuit Court of Appeals.

It is to be emphasized that the Respondent Bank renounced its loan to Petitioners even before the date agreed upon for the completion of the apartment complex.

Architect Rucinski testified that the property was not constructed in a good and workmanlike manner. Frank Lansky, a competent architect, testified just the opposite, as did officers of The Galbreath Company, which loaned Petitioners temporary construction money. The jury was out only approximately twenty-five minutes before it returned a verdict in behalf of Petitioners, and this record is replete with testimony to the effect

that the building was constructed in accordance with the plans and specifications and was constructed in a good and workmanlike manner, and that the actions of Architect Rucinski, in collaboration with officers of Respondent Bank, were fraudulent or so obviously unjust as to imply bad faith or gross neglect.

In conclusion, Petitioners respectfully allege that the proof in this case is overwhelming to support the verdicts of the jury and the judgment of the Trial Court in awarding Petitioners One Hundred Thousand ($100,000.00) Dollars, and that the same should be affirmed.

Petitioners respectfully submit that the Court was in error in granting Respondent's motion for a judgment notwithstanding the verdict of the jury, and that this Honorable Court should reinstate the Fifty Thousand ($50,000.00) Dollars in punitive damages awarded Petitioners.

This eleventh day of May, 1981.

Respectfully submitted,

Charles G. Black
Attorney for Petitioners
Suite 2901, 100 North Main Building
Memphis, Tennessee 38103
(901) 525-4618

CERTIFICATE OF SERVICE

I, Charles G. Black, hereby certify that I have served three copies of the foregoing Petition upon Respondent herein, by hand-delivering same to its attorneys of record, MARTIN, TATE, MORROW & MARSTON, P. C., 705 Union Planters National Bank Building, 67 Madison Avenue, Memphis, Tennessee 38103, on this thirteenth day of May, 1981.

_____

Charles G. Black

APPENDIX

Nos. 79-1039-40

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FREDDIE GOLD and wife, GOLDIE GOLD, *Plaintiffs-Appellees, Cross-Appellants,* v. NATIONAL SAVINGS BANK OF THE CITY OF ALBANY, *Defendant-Appellant, Cross-Appellee.*	APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed February 13, 1981.

Before: EDWARDS, Chief Judge; KEITH and BROWN, Circuit Judges.

KEITH, Circuit Judge. This diversity case arises out of the alleged breach of a permanent financing agreement by the defendant bank. In answering a special interrogatory, the jury below found that the bank acted fraudulently in refusing to make a permanent loan to the plaintiffs. The jury awarded the plaintiffs $150,000 compensatory and $50,000 punitive damages. The district court, however, granted a judgment n.o.v. regarding the punitive damages and ordered remittitur of $50,000 of the compensatory damages. Both parties appealed. For the reasons discussed below, we affirm the district court's judgment n.o.v. with respect to the punitive damages and reverse the district court's decision not to grant judgment n.o.v. with respect to the compensatory damages.

FACTS

I

Plaintiff Freddie Gold, a Memphis real estate developer, approached Percy Galbreath & Sons, Inc., a mortgage banking institution located in Memphis, regarding construction financing of a 32 unit apartment complex in Memphis known as the Overton Square Apartments. Gold had been in the real estate development business for at least 12 years, and for most of that time had used Galbreath both to provide construction financing for his various projects and to locate permanent financing from third parties.

Gold filed his application with Galbreath in the instant case on March 6, 1973. The application called for a 15 month construction loan for $300,000 at 8¾% interest, and as in most of the previous deals between Gold and Galbreath, the latter would be responsible for arranging permanent financing when the apartment complex was completed. It was contemplated that the permanent loan for the apartment complex would have a term of 27 years at 8¾% interest *per annum*. The application also contained the following clause with regard to the permanent loan:

> Final working plans and specifications are to be satisfactory to the permanent lender prior to the beginning of construction. Completion of construction will be evidenced by periodic inspections and final approval by the architect, by the lender's representatives and by the municipal authorities.

Later, Galbreath secured a written commitment for permanent financing of Gold's apartment complex from Defendant National Savings Bank of the City of Albany. This commitment incorporated the terms specified in Gold's application to Galbreath. However, paragraph four of the agreement between the bank and Galbreath also provided that the bank's

obligation to fund the permanent loan was conditioned on the following:

> The apartment building and other improvements located on the mortgaged premises are to be constructed in a good and workmanlike manner and in accordance with the plans and specifications submitted by you to us. At the completion of the construction of the apartment building and other improvements, we shall be furnished with a certification by your architect that the building has been constructed in accordance with such plans and specifications. We shall also have the option of designating our own representative for the purpose of inspecting the construction of the apartment building and other improvements and his determination as to whether such construction has been performed in accordance with the plans and specifications and as to whether such construction is in a good and workmanlike manner shall be final and conclusive.

On April 6, 1973, Galbreath issued its written commitment to provide the loan package sought by Gold. In addition to providing construction financing, Galbreath agreed to arrange permanent financing under the terms and interest rates originally specified by Gold. However, this commitment contained language identical to that of paragraph four of the Bank-Galbreath agreement which conditioned the obligation of the permanent lender to fund the loan upon the completion of the apartment complex in a manner satisfactory to the permanent lender.

The Galbreath written commitment, which was approved by Gold later, also provided that:

> In the event the apartment building and other improvements on the mortgaged premises are not completed in accordance with the provisions of this letter of committment by January 31, 1974, or any other term or condition of this letter of committment is not fulfilled by January

> 31, 1974, National Savings Bank's commitment to make the mortgage shall, at their option, terminate.

Although Gold had agreed to have the apartment complex completed by January 31, 1974, he was not able to meet the completion date. Galbreath, however, agreed to extend construction financing beyond the January 31, 1974, date and until Gold actually completed the complex. In return, Galbreath increased the interest rate on the construction loan from the original 8¾% rate to 10% *per annum*. The bank also extended its committment. Under the terms of the agreements between the parties, the bank was entitled to terminate its obligation to provide financing since the complex was not completed by January 31, 1974, but instead the bank extended its commitment on five separate occasions. In return, the bank increased the rate of interest charged for the permanent financing from the original 8¾% to 9½%.

When Gold finally completed the apartment complex, Galbreath notified the defendant bank. Officials of the bank then arranged an inspection visit so that they could determine to their satisfaction if the complex had been constructed in accordance with the plans and specifications. Bank vice-president R. Boubin and Mr. Peters, a trustee of the bank, arrived in Memphis on October 10, 1974, as part of a multi-state inspection trip that included inspections in Green Bay, Wisconsin, and Knoxville, Tennessee, as well as inspections of other properties in Memphis.

During the course of the two-hour inspection of Gold's apartment complex, Boubin and Peters found a number of apparent deficiencies in the construction of the complex. In their view, these deficiencies were so substantial that construction of the complex could not be deemed in compliance with the plans and specifications. The day after the inspection the defendant bank informed Galbreath that it would not be able to fund the loan because of the deficiencies.

A short time later, Galbreath informed the bank that struc-

tural corrections had been made on the complex since the October 10th inspection. Galbreath took the position that the complex was now in compliance with the plans and specifications. Pursuant to paragraph four of the Galbreath committment with the bank, the parties agreed that the bank should select an architect to determine if the complex had been built in a workmanlike manner and in accordance with the plans and specifications. The architectural firm of Donald J. Stephens Associates, Albany, N.Y., was chosen, and Ronald R. Rucinski, a partner in the firm, came to Memphis on October 30-31 to make the inspection. He found 47 examples of unworkmanlike construction. Therefore, on November 19, 1974, the bank wrote Galbreath and advised that it would not fund the loan.

Gold continued to own the property from November 19, 1974, to March 1976, when he conveyed the apartment complex to Galbreath by deed in lieu of foreclosure. On December 31, 1974, Gold filed this suit against the National Savings Bank of the City of Albany.

II

In his complaint, Gold alleged that the defendant bank wrongfully and willfully breached its contract, under the terms and conditions of the permanent loan committment, by fraudulently declining to fund the loan. The fraud alleged in the complaint was based on the belief that the bank intentionally refused to fund the loan because it wanted to take advantage of higher interest rates made possible by passage of the "Brock Bill."[1] At trial, Gold contended that the bank's ex-

[1] On October 29, 1974, the United States Congress passed and the President signed a Bill entitled the Debt Obligation and Usury Ceiling Act, commonly referred to as the "Brock Bill." Pub.L. No. 93-501, 88 Stat 1552 (1974). Under this legislation national banks were permitted to charge interest rates not to exceed 13½% per annum in states, such as Tennessee, which had constitutional limits of 10% on permissible interest charges.

planation that it decided not to fund the loan because of noncompliance with plans and specifications was only pretextual.[2]

The district court correctly ruled that *Railroad* v. *Central Lumber and Manufacturing Co.*, 95 Tenn. 538, 32 S.W. 635 (1895), provided the applicable law in this case. In that decision the Supreme Court of Tennessee opined that:

> where parties to a construction contract of any kind agree to submit differences, questions of any character arising in connection with the work to the decision of an architect or engineer, the decision of the arbiter thus selected is final, all parties are bound by it unless it be shown that the estimate or conclusion is fraudulent or is so excessive or palpably injust as to imply bad faith or gross neglect. *Id.* at 543.

After all the evidence was introduced at trial, the district court denied the bank's motion for directed verdict and submitted the following special interrogatory to the jury:

> Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were

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[2] During his Opening Statement at trial, counsel for the plaintiffs stated:

> There is a provision in the contract that says they (the bank) have a right to come down and inspect the property (the apartment complex). And I believe the language of that section . . . says that their inspection of the property and their judgment is final. They have the right to come down and say 'We like it' or 'We don't like it, we ain't going to buy the loan' . . . so Gold, right after the Jewish Holiday was over, went out there and corrected and I hope the proof will show and I think it will show that all of the deficiencies set out by these inspectors and Mr. Ruzinski who was sent down to inspect this property were either frivolous or so minor that it wasn't justification for canceling or not buying the loan.

However, the plaintiffs failed to make this showing of frivolity during the trial and failed to introduce other evidence that would have supported an inference of fraudulent intent on the part of the bank or its architect. Rather than being frivolous citations, the 47 deficiencies noted by Rucinski included: (1) an absence of handrails on exterior concrete stairs; (2) "hundreds" of half-inch drilled holes in the exterior siding of the building which would permit water and moisture to enter the walls which would eventually cause delamina-

not constructed in accordance with the plans and specifications and were not constructed in a good and workmanlike manner fraudulent or so obviously unjust as to imply bad faith or gross neglect?

Yes ____ No ____

The jury answered the interrogatory "Yes", finding that Rucinski's determination had been made in bad faith. After hearing the parties' arguments with respect to damages, the jury awarded $150,000 compensatory and $50,000 punitive damages. However, the district court partially granted the bank's motion for judgment n.o.v. It struck down the punitive damage award and ordered remittitur of $50,000 of the compensatory award. We agree with this ruling.

The district court, however, did not grant the bank's motion for judgment n.o.v. with respect to the jury's compensatory award. Accordingly, the issue presented to this court on appeal is whether there is sufficient evidence in the record to support the jury's finding that the bank's architect, Ronald R. Rucinski, acted in bad faith in determining that the apart-

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tion of the plywood and permit moisture to enter the insulation; (3) exterior corners of the plywood were butt jointed together without caps which would permit water to enter the plies of plywood causing delamination; (4) a large number of electrical conduits were not sealed to prevent the entrance of water; (5) no safety disconnect switches on airconditioners; (6) hazardous tripping conditions on certain stairwells; (7) non-compliance with the plans and specifications in the roof decking; (8) missing and faulty drain pipes; (9) unaccessible hot water heater valves; (10) absence of drain pans under certain water heaters; (11) faulty installation of insulation; (12) an inadequate amount of insulation; (13) faulty installation of toilet ducts; (14) faulty construction of certain firewalls; (15) faulty construction of certain heating unit closets and related ductwork; (16) inadequate support in the roofing of the complex; and (17) deviations from the prescribed design of the roof. In fact, as the bank points out in its brief, 29 of the deficiencies noted by Rucinski were also found by Gold's architect, Frank Lansky. Although the plaintiffs called some 18 witnesses during the course of the trial, they did not establish either indirectly or directly that Ruzinski's report was given in bad faith or that the bank otherwise fraudulently refused to fund the permanent loan.

ment complex was not constructed in accordance with the plans and specifications. For the reasons discussed below, we find that the jury's determination was not supported by sufficient evidence.

A

It is well settled in this circuit that in diversity cases the federal courts are bound by state law in determining whether there is sufficient evidence to support a jury's verdict. *See Standard Alliance Industries* v. *The Black Clawson Co.*, 587 F.2d 813, 812-4 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Chumbler* v. *McClure*, 505 F.2d 489 (6th Cir. 1974); and *Wallace* v. *Louisville and Nashville Railway Co.*, 332 F.2d 97 (6th Cir. 1974).[3] In Tennessee, the rule of law with respect to appellate review of the sufficiency of evidence is that all the evidence for the prevailing party must be taken as true. Moreover, all reasonable inferences favorable to the prevailing party must be made and all countervailing evidence must be disregarded. *See Phelps* v. *Magnavox Co. Of Tennessee*, 497

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[3] There is currently a circuit split on the issue of whether federal or state law controls in diversity cases when determining if sufficient evidence has been presented to withstand a motion for judgment n.o.v. *Compare, e.g., Wratchford* v. *S. J. Groves and Sons Co.*, 405 F.2d 1081 (4th Cir. 1969), and *Kuzin* v. *Lake Engineering Co.*, 586 F.2d 33 (7th Cir. 1978). *See also* Annot. 10 ALR Fed. 451, 5A Moore's Federal Practice ¶ 50.06 and 7 Wright & Miller § 2525.

While this circuit has continued to hold that state law determines the sufficiency of the evidence in diversity cases, *see, e.g., Garrison* v. *Jervis B. Webb Co.*, 583 F.2d 258 (6th Cir. 1978), we have not had occasion to closely examine this issue since *Hanna* v. *Plummer*, 380 U.S. 460, 466-69 (1965). We note, however, that the continued vitality of this rule is open to question, especially in light of *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977) ("The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law.") In fact, several circuits which followed this rule earlier now hold that federal law controls. *See, e.g., Denneny* v. *Spiegel*, 407 F.2d 433 (3rd Cir. 1969), and *Oldenburg* v. *Clark*, 489 F.2d 839, 841 (10th Cir. 1974).

In this case, as the text of the opinion makes clear, application of either state or the federal rule mandates a judgment for the defendant, since there was no probative evidence of fraudulent intent on the part of the defendant or its architect introduced at trial.

S.W.2d 898 (Tenn. App. 1972). However, it is also clear that under Tennessee law there must be substantial and material evidence from which the jury could have based a verdict for the prevailing side. *Id. See also Camurati* v. *Sutton*, 48 Tenn. App. 54, 342 S.W.2d 732 (1960), and *Cude* v. *Culberson*, 30 Tenn. App. 628, 209 S.W.2d 506 (1947).

Upon a review of the record in the case, we have found no evidence, much less substantial evidence, to support the jury's affirmative answer to the special interrogatory submitted by the court. The plaintiff did introduce evidence showing that the bank refused to fund the permanent loan at around the same time that the Brock Bill was enacted by Congress, but this fact alone is plainly insufficient to support an inference that the bank's architect inspected the apartment complex with bad faith. The plaintiff introduced no direct evidence of any fraudulent behavior on the part of Rucinski. In fact, there was no evidence introduced showing that bank officials or Rucinski ever discussed the Brock Bill in connection with Gold's apartment complex project. Finally, there was no evidence introduced of any fraudulent intent or motivation on the part of Rucinski to wrongfully issue an unfavorable report on the quality of the workmanship of the construction project.

Without considering the substantial countervailing evidence supporting the bank's view of the transaction and taking the evidence introduced by Gold in the light most favorable to him, there is still inadequate evidentiary support for a judgment in favor of the plaintiff. As the Tennessee Supreme Court has noted in *Jones* v. *Seal*, 56 Tenn. App. 593, 409 S.W. 2d 382 (1966), "the facts and circumstances proved [at trial] must clearly establish the inference of fraud." 409 S.W.2d at 385. *See also Anderson* v. *Nichols*, 39 Tenn. App. 503, 286 S.W.2d 96 (1955). A jury cannot render a verdict on the basis of speculation, surmise or conjecture. *See Dayton Veneer & Lumber Mills* v. *Cincinnati N.O.&T.P. Railway Co.*, 132 F.2d 222 (6th Cir. 1942); *Cecil Corley Motor Co., Inc.* v. *General*

Motors Corp., 380 F.Supp. 819 (M.D. Tenn. 1974), and *Groves* v. *Witherspoon*, 379 F.Supp. 52 (E.D. Tenn. 1974). Therefore, the district court should have granted the defendant's motion for judgment n.o.v. with respect to the award of compensatory damages.

Accordingly, the decision of the district court granting judgment n.o.v. on the question of punitive damages is affirmed and the decision denying judgment n.o.v. on the question of compensatory damages is reversed.

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1966

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FREDDIE GOLD and Wife, GOLDIE GOLD,

Petitioners,

v.

NATIONAL SAVINGS BANK
OF THE CITY OF ALBANY,

Respondent.

SUPPLEMENTAL APPENDIX

Charles G. Black
Attorney for Petitioners
Suite 2901, 100 North Main Building
Memphis, Tennessee 38103
(901) 525-4618

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

FREDDIE GOLD and Wife, GOLDIE GOLD,

Plaintiffs,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,

Defendant.

NO. C-74-640

VERDICT

(Filed December 14, 1977)

We, the jury, assess compensatory damages in favor of the plaintiffs in the amount of $150,000.00.

/s/ THELMA B. PERKINS
Foreperson

We, the jury, assess punitive damages in favor of the plaintiffs in the amount of $50,000.00.

/s/ THELMA B. PERKINS
Foreperson

December 14, 1977
Date

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FREDDIE GOLD and Wife, GOLDIE GOLD,

Plaintiffs,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,

Defendant.

NO. C-74-640

JUDGMENT

(Filed December 15, 1977)

This action came on for trial before the Court and a jury, Honorable Robert M. McRae, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of Plaintiffs.

It is Ordered and Adjudged compensatory damages in amount of One Hundred & Fifty Thousand Dollars ($150,000.00) be assessed in favor of the Plaintiffs and punitive damages be assessed in favor of the Plaintiffs

in the amount of Fifty Thousand Dollars ($50,000.00).

Approved. /s/ ROBERT M. McRAE, JR.
United States District Judge

Dated at Memphis, Tennessee, this 15th day of December, 1977.

/s/ J. FRANKLIN REID
Clerk of Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

FREDDIE GOLD and Wife, GOLDIE GOLD,

Plaintiffs,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,

Defendant.

NO. C-74-640

ORDER ON MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL

(Filed July 13, 1978)

In this cause the defendant has filed a Motion for a Judgment Notwithstanding the Verdict or in the Alternative a Motion for a New Trial. Memoranda have been filed by both parties and a hearing was conducted. This is the ruling on the motions.

The case was based upon the breach of a contract whereby the defendant bank was to lend to the plaintiffs $300,000 on certain real estate in Memphis, Tennessee, upon which the plaintiff Freddie Gold had

caused to be constructed certain apartments. Because the contract between the parties contained a provision that a representative of the bank might determine if the apartments were constructed in a good and workmanlike manner and in accordance with the plans and specifications, this Court determined that the case of *Railroad* v. *Central Lumber and Manufacturing Co.*, 95 Tenn. 538, 32 S.W. 635 (1895) was the controlling authority applicable to the facts of this case. That case required the plaintiffs to show conduct which was fraudulent or so obviously unjust as to imply bad faith or gross neglect.

The Court submitted the following Special Interrogatory to the jury:

> Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were not constructed in accordance with the plans and specifications and were not constructed in a good and workmanlike manner, fraudulent or so obviously unjust as to imply bad faith or gross neglect?
>
> _____ Yes _____ No

The jury answered "yes." The Court then submitted other interrogatories with respect to damages, and the jury returned a verdict of $150,000 for compensatory damages and $50,000 for punitive damages.

The Motion for a Judgment Notwithstanding the Verdict is based upon three grounds. One is based upon the insufficiency of the pleadings and the other two are based upon the insufficiency of the evidence on the respective issues of liability and damages in favor of the plaintiffs. The Court overrules that motion upon all grounds.

The Motion for a New Trial is based upon nine numbered grounds.

Number one goes to the weight of the evidence, and it is overruled.

Numbers two, three, four, and nine are based upon contentions that portions of the instructions given to the jury by this Court were erroneous. Ground numbered eight is based upon the failure of the Court to give five instructions as requested by the defendant. All grounds based upon the instructions given and not given are overruled.

Ground number five is based upon the contention that the compensatory damages were so excessive as to indicate passion, prejudice and caprice on the part of the jury so as to shock the conscience of the Court. The Court agrees with this contention to the extent that the Court suggests a remittitur to a judgment for compensatory damages of $100,000.00. In this regard the Court notes that the claims for damages prior to the trial were multiple and confusing. Some of those were withdrawn, and the proof offered on the question of damages were also confusing. This Court believes that maximum damages allowable would be the value of the apartments as of the date of the breach and the amount of the loan. This amount, based upon the credible proof, would be $100,000.00. In this regard it should be noted that there was proof that loans were not available from other sources at the time of the alleged breach, therefore the difference between the terms of the loan commitment of the defendant and the extra costs of obtaining another loan was not available as a means of calculating and proving damages.

Grounds six and seven are based upon the respective contentions that there was insufficient evidence to sup-

port an award of punitive damages and alternatively, that the award of $50,000 was so excessive that it indicates passion, prejudice and caprice on the part of the jury.

Based upon the issues and proof in this case, the Court also suggests a remittitur of the entire amount awarded by the jury as punitive damages.

The Court is not unmindful that it instructed the jury that it could award punitive damages if the conduct of the representative of the defendant was malicious and wilful. This was based upon the Tennessee law which recognizes that punitive damages may be awarded in cases involving fraud, maliciousness or gross neglect. However, it must be noted that, in the instant case, the plaintiff was required to prove fraud, bad faith or gross neglect to establish liability for any consequential compensatory damages. Furthermore, the method approved for calculating compensatory damages for breach of a loan commitment was maximal. Therefore, upon the total circumstances this Court concludes that the entire award of $50,000 punitive damages should be eliminated from the judgment.

In summary, the Court overrules the motions of the defendant on all grounds except on the Motion for New Trial the Court suggests a remittitur so that the final judgment shall be $100,000 for compensatory damages, and no punitive damages.

IT IS SO ORDERED, and the Clerk is directed to enter a judgment accordingly.

ENTER: This 13th day of July, 1978.

/s/ ROBERT M. McRAE, JR., Judge
United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FREDDIE GOLD and Wife, GOLDIE GOLD,

Plaintiffs,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,

Defendant.

NO. C-74-640

AMENDED JUDGMENT

(Filed July 14, 1978)

In this cause, a trial jury awarded plaintiffs $150,000.00 compensatory and $50,000.00 punitive damages and a judgment to that effect was entered by the Court on December 15, 1977. Subsequently, defendant filed a motion for Judgment Notwithstanding the Verdict or for New Trial. On July 13, 1978, the Court entered an order on defendant's motion. In compliance with that order, the original judgment entered on December 15, 1978, is amended as follows.

A remittitur is suggested so that judgment will be $100,000 for compensatory damages, and no punitive

damages awarded. If the Court's suggestion of remittitur is accepted within thirty days from the entry of this amended judgment, all other relief prayed for in defendant's motion is denied. Otherwise, defendant will be granted a new trial.

Approved: /s/ ROBERT M. McRAE, JR.
U. S. District Judge

J. FRANKLIN REID
Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

FREDDIE GOLD and Wife, GOLDIE GOLD,

Plaintiffs,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,

Defendant.

NO. C-74-640

ORDER ON APPLICATION FOR AMENDED JUDGMENT

(Filed Aug. 22, 1978)

In this cause the Court on July 13, 1978, entered an Order on Motion for a Judgment Notwithstanding the Verdict or in the Alternative Motion for New Trial, which provided as follows:

> In summary, the Court overrules the motions of defendant on all grounds except on the Motion for New Trial the Court suggests a remittitur so that the final judgment shall be $100,000 for compensatory damages and no punitive damages.

Pursuant to that Order the Clerk caused an Amended

Judgment to be entered on July 14, 1978. That Amended Judgment provided in part as follows:

> If the Court's suggestion of remittitur is accepted within thirty days from the entry of this Amended Judgment, all other relief prayed for in defendant's motion is denied. Otherwise, defendant will be granted a new trial.

On August 8, 1978, there was filed in the cause Plaintiffs' Reply to the Judgment as Amended in This Cause, wherein it was indicated that the plaintiffs desired to accept the remittitur of $50,000 so that a final judgment on the issue of compensatory damages would be $100,000. However, with regard to the ruling on punitive damages, the plaintiffs contend that the Court eliminated the right to punitive damages as a matter of law, and therefore the Court should not have called its ruling a remittitur of punitive damages. Counsel for the plaintiffs submitted a form of amended judgment for the Court's approval designed to support the plaintiffs' position.

Counsel for the defendant submitted a different form of order designed to amend the judgment consistent with the position taken by the defendant. Upon the authority of *Donovan* v. *Penn Shipping Company, Inc.* 429 U.S. 648 (1977), the defendant contends that the plaintiffs must accept the entire remittitur of compensatory and punitive damages or a new trial shall be granted.

The Court conducted a hearing where the lawyers were allowed to argue the respective contentions of the parties. This Order hereby rules upon these post-verdict issues.

Upon further consideration this Court is of the

opinion that the ruling wherein all punitive damages were disallowed was erroneously called a remittitur by the Court. The Court is of the opinion that the punitive damages are not allowable as a matter of law under the facts of this case. The Court is of the opinion that it should not submit any punitive damage question to the jury if the case is to be retried.

The Court hereby concludes that a judgment notwithstanding the verdict should be granted in favor of the defendant on the issue of punitive damages.

IT IS THEREFORE ORDERED that the former ruling and judgment of this Court entered on July 13th and 14th, 1976, respectively, is hereby corrected in that a remittitur of $50,000 is granted upon the award of the jury of compensatory damages, and a judgment notwithstanding a verdict is granted in favor of the defendant upon the issues pertaining to punitive damages.

The plaintiffs having indicated within the time allowed that they would accept the remittitur of $50,000 of the $150,000 of compensatory damages awarded by the jury, the Clerk of this Court is hereby directed to enter a Final Corrected Judgment in favor of the plaintiffs in the amount of $100,000.

ENTER: This 22nd day of August, 1978.

/s/ ROBERT M. McRAE, JR.
Judge, United States Distict Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

FREDDIE GOLD and Wife, GOLDIE GOLD,

Plaintiffs,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,

Defendant.

NO. C-74-640

FINAL CORRECTED JUDGMENT

(Filed August 22, 1978)

In compliance with Order On Application for Amended Judgment entered on August 22, 1978, the Court concludes that a judgment notwithstanding the verdict should be granted in favor of the defendant on the issue of punitive damages.

It Is Therefore ORDERED that the former ruling and judgment of this Court entered on July 13th and 14th, 1978, respectively, is hereby corrected in that a remittitur of $50,000.00 is granted upon the award of the jury of compensatory damages, and a judgment notwithstanding a verdict is granted in favor of the

defendant upon the issues pertaining to punitive damages.

The plaintiffs having indicated within the time allowed that they would accept the remittitur of $50,000.00 of the $150,000.00 of compensatory damages awarded by the jury, a Final Corrected Judgment in favor of the plaintiffs in the amount of $100,000.00 is hereby entered.

APPROVED: /s/ ROBERT M. McRAE, JR.
United States District Judge

Dated at Memphis, Tennessee, this 22nd day of August, 1978.

/s/ J. FRANKLIN REID
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-1039

No. 79-1040

FREDDIE GOLD and wife,
GOLDIE GOLD,

Plaintiffs-Appellees,
Cross-Appellants,

v.

NATIONAL SAVINGS BANK
OF THE CITY OF ALBANY,

Defendant-Appellant,
Cross-Appellee.

Before: EDWARDS, Chief Judge; KEITH and BROWN, Circuit Judges.

JUDGMENT

(Filed February 13, 1981)

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennesse and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as to the granting n.o.v. on the question of punitive damages, reversed as to the denial n.o.v. on the question of compensatory damages.

Each party to bear own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN
Clerk

A True Copy.

Attest: /s/ AUDREY CROCKETT
Deputy Clerk

Issued as Mandate: March 10, 1981

CERTIFICATE OF SERVICE

I, Charles G. Black, hereby certify that I have served three copies of the foregoing Petition upon Respondent herein, by hand-delivering same to its attorneys of record, MARTIN, TATE, MORROW & MARSTON, P. C., 705 Union Planters National Bank Building, 67 Madison Avenue, Memphis, Tennessee 38103, on this 16 day of June, 1981.

Charles G. Black

80-1966

No.

Office-Supreme Court, U.S.
FILED
JUN 12 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDDIE GOLD and Wife, GOLDIE GOLD,
Petitioners,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For The Sixth Circuit

S. SHEPHERD TATE
LEE L. PIOVARCY
705 Union Planters Bank Building
Memphis, Tennessee 38103
(901) 525-5881
Attorney for Respondent, National Savings Bank of the City of Albany

MARTIN, TATE, MORROW & MARSTON, P.C.
of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDDIE GOLD and Wife, GOLDIE GOLD,
Petitioners,

v.

NATIONAL SAVINGS BANK OF THE CITY OF ALBANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For The Sixth Circuit

INTRODUCTION AND JURISDICTIONAL STATEMENT

Respondent National Savings Bank of the City of Albany ("Bank") prays that the Petition For Writ of Certiorari of Freddie Gold and wife Goldie Gold ("Gold") be denied for the reason that the judgment of the United States Court of Appeals for the Sixth Circuit, entered on February 13, 1981, is correct. The written opinion of the appellate court is contained in the Appendix to Gold's Petition and, therefore, is not appended hereto.

Bank agrees with the jurisdictional statement contained in Gold's Petition.

STATEMENT OF THE PROCEEDINGS BELOW

This diversity case arises out of an alleged breach of a written commitment to provide a permenant loan by the Bank to Gold. By special interrogatory, the jury found that the Bank acted fraudulently in refusing to make a permanent loan to Gold. Gold was awarded $150,000.00 compensatory and $50,000.00 punitive damages by the jury. Bank moved for a judgment n.o.v. with respect to the compensatory and punitive damage verdicts. The trial court granted the Bank a judgment n.o.v. as to punitive damages and denied Bank a judgment n.o.v. as to the compensatory verdict but ordered a remittitur of $50,000.00 of the compensatory award. Bank appealed the jury's determination on the special Interrogatory and an award of damages in any amount. Gold did not appeal the remittitur of $50,000.00 but filed a cross-appeal as to the trial court's decision to grant a judgment n.o.v. with respect to the punitive damage award.

The appellate court affirmed the District Court's judgment n.o.v. in favor of the Bank with respect to punitive damages and reversed the District Court's decision which denied the granting of the judgment n.o.v. with respect to compensatory damages.

The question presented to the appellate court was whether there was sufficient evidence in the record to support the jury's finding that the bank's architect, Ronald R. Rucinski, acted in bad faith in determining that the apartment complex in question was not constructed in accordance with the plans and specifications and in a good and workmanlike manner.

STATEMENT OF FACTS

In their Complaint, Gold alleged a breach of a written commitment to provide a permanent loan by the Bank to apartment

owners and developers, Gold.[1] The purpose of the commitment was to provide permanent financing for a 32 apartment complex known as Overton Square Apartments in Memphis, Tennessee. The principal amount of the loan was $300,000.00 at the rate of 9¼% per annum for twenty-seven years.[2]

After the apartment complex was built, the Bank declined to fund the loan as it was permitted to do under the permanent loan commitment on the basis of the inspection and written report of an independent architect, Ronald R. Rucinski, who advised the Bank that serious deficiencies existed on the complex.

Gold claims the bank declined to fund the permanent loan because the Bank wanted to take advantage of the newly passed federal legislation which would allow the Bank to increase the rate of interest on said permanent loan in excess of the 10% rate of interest in Tennessee.

The Bank admitted that it declined to fund the permanent loan but denied that the declination was involved in any way with the new federal legislation affecting interest rates. To the contrary, the Bank declined the permanent loan because Gold failed to comply with a provision in the permanent loan commitment to which Gold had agreed, that is, to furnish an architect's certificate that the apartment complex had been constructed in a good and workmanlike manner and according to the final plans and specifications submitted to the Bank. Gold

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[1]Actually there was no direct agreement between the bank and Gold. However, the bank agreed by a commitment letter with Gold's mortgage banker, Percy Galbreath & Son, Inc. ("Galbreath") to make available to Gold a permanent loan for the Overton Square Apartments.

[2]Originally, the rate of interest was 8 3/4% but after a long delay in completion of construction which required four extensions, the parties agreed on 9¼% per annum.

admitted that he never submitted any architect's certificate as required under the first condition of the loan. Secondly, Gold had agreed in the loan commitment to allow an independent architect to inspect the apartment complex and determine if it was constructed in a good and workmanlike manner and in accordance with plans and specifications submitted to the Bank. According to the terms of the loan commitment, this architect's determination would be final and conclusive.

Although Gold agreed to have the apartment complex completed by January 31, 1974, it is undisputed that he did not begin construction until August 21, 1973 and after several extensions requested by Gold, the complex was not completed until after November 29, 1974. Under the terms of the permanent loan agreement, the Bank was entitled to terminate its commitment to provide permanent financing since the complex was not completed by January 31, 1974, but instead the Bank extended its commitment on five separate occasions. In return, the Bank increased the rate of interest charged for the permanent financing from the original 8 3/4% to 9¼%. During the same period of time, construction financing which was provided by Galbreath, was increased from 9 3/4% to 10%.

Upon notification that the apartment complex was completed, the Bank sent one of its loan officers and one of its trustees to inspect the improvements. This inspection revealed to the Bank representatives apparent evidence of poor workmanship and substantial deviations from the plans and specifications submitted to the Bank. Thereafter, within a few days of the Bank official's inspection, representatives of Galbreath visited the Bank in Albany, New York, on behalf of Gold, and claimed that the deficiencies had been corrected and that the apartment building deserved another inspection. The parties agreed that pursuant to paragraph 4 of the permanent loan commitment, the Bank would send an architect to inspect the premises to determine if the improvements were constructed in a good and workmanlike manner and in accordance with the

plans and specifications submitted to the Bank. Architect Rucinski was chosen by the Bank to inspect the premises. He had no relationship to the Bank either as a depositor or by prior employment. He did live and practice his profession in Albany, New York. After Rucinski inspected the improvements for workmanship and conformance to the plans and specifications as submitted to the Bank, he sent the Bank a written report of forty-seven items on which he based his findings that the apartment complex contained serious deficiencies.

After receiving Rucinski's report, the Bank advised Gold through his representative, Galbreath, that it would not fund the permanent loan because the construction had not been done in accordance with the plans and specifications and in a good and workmanlike manner.

Approximately two months after the Bank refused to fund the permanent loan, Frank Lansky, Gold's architect, who drew the plans and specifications for said complex, made an inspection on behalf of Gold. He prepared two reports, the first revealing 29 deficiencies in the workmanship and variations from the plans of specifications which were among the 47 deficiencies found by Rucinski.

In October, 1974, the U.S. House of Representatives and the U.S. Senate passed and the President signed a Bill entitled Debt Obligation and Usury Ceiling which is commonly known as the "Brock Bill" because it was introduced by Senator Brock from Tennessee. The Brock Bill allowed states, such as Tennessee which had a constitutional limit of interest of 10%, to charge interest not to exceed 13½% per annum. The National Savings Bank of the City of Albany, although it contains the word "National" in its name, is not a national bank under the United States Statutes but rather is a State Savings Bank chartered in the State of New York. At or about the time that the Brock Bill was passed and signed into law, the Bank was advised by its attorneys in Albany that such Bill did not apply to their Bank.

Later, during the pendency of the instant lawsuit, the Bank's attorneys advised that the Brock Bill was applicable to said Bank and that it could charge rates not in excess of 13½% per annum if it so desired. No officials of Galbreath ever had any discussions with the Bank regarding the Brock Bill or its applicability to Gold's loan. Furthermore, Mr. Gold never conversed with any officials of the Bank with respect to any aspects of the apartment complex. All of his dealings were with Galbreath and its officers. Likewise, Gold had no conversations with anyone from Galbreath regarding the Brock Bill. Indeed, Gold was not even aware of the provisions of the Brock Bill. Passage of the Brock Bill was not in any way involved with the Bank's decision to decline to fund the permanent loan for Gold's apartment complex. The Bank closed other permanent loans in Memphis and Knoxville, Tennessee, after the time that Gold's loan was to be closed and all of these loans were at rates of interest which were lower than the rate of interest agreed to between the Bank and Gold. On January 15, 1975, the Bank closed a permanent loan apartment project on Carnes Avenue, Memphis, Tennessee in the sum of $290,000.00 at a rate of interest of nine percent (9%) and, also, during this same month, the Bank closed a permanent loan in Knoxville, Tennessee for the sum of $600,000.00 at a rate of interest of nine percent (9%). Neither before nor after the termination of the permanent loan commitment did the Bank ever suggest to Gold or Galbreath that it would agree to furnish permanent financing at a rate of interest higher than 9¼%.

QUESTION PRESENTED FOR PURPOSES OF GRANTING OR DENYING GOLD'S PETITION FOR WRIT OF CERTIORARI

Under the facts of this diversity case, was the federal court bound by state law or federal law in determining whether there was sufficient evidence to support the jury's verdict and whether there was sufficient evidence to withstand a motion for judgment n.o.v.

Answer of Respondent Bank:

> There is no reason for this question to be considered by this Court because, under the facts of this case, applying either the state or federal standard, would result in a judgment n.o.v. for Respondent Bank.

ARGUMENT

Gold asserts that the Petition should be granted to allow this Court to review the standard, state or federal, to be used in determining the sufficiency of evidence to go to the jury where jurisdiction is based upon diversity.

Gold further asserts that the appellate court in the instant case applied the well settled rule in the Sixth Circuit that in diversity cases, federal courts are bound by state law in determining whether there is sufficient evidence to support a jury verdict.

In Tennessee, the rule of law with respect to the scope of Appellate review, is that all evidence for the plaintiff must be taken as true, allowing all reasonable inferences therefrom and disregarding all contravailing evidence; however, there must be substantial and material evidence from which the jury could have based a verdict for the plaintiff. *Phelps* v. *Magnavox Co.*, 497 S.W.2d 898 (Tenn. App. 1972); See also *Camurati* v. *Sutton*, 48 Tenn. App. 54, 342 S.W.2d 732 (1962), and *Cude* v. *Culverson*, 30 Tenn. App. 628, 209 S.W.2d 506 (1947).

Although it based its decision in the instant case on state law, the appellate court recognized there is currently a split in the circuits as to whether the issue of federal or state law controls in diversity cases when determining if sufficient evidence has been presented to withstand a motion for judgment n.o.v. Citing for comparison, *Wratchford* v. *S. J. Groves and Sons Co.*, 405 F.2d 1061 (4th Cir. 1969), and *Kuziw* v. *Lake Engineering Co.*, 586 F.2d (7th Cir. 1978).

In the same footnote of the appellate decision which recognized the split in circuits, the court was quick to add:

> In this case, as the text of the Opinion makes clear, application of either state or the federal rule mandates a judgment for the defendant, since there was no probative

> evidence of fraudulent intent on the part of the defendant or its architect introduced at trial.

In the body of the appellate decision, the Court stated:

> Upon a review of the record in the case, we have found no evidence, much less substantial evidence, to support the jury's affirmative answer to the special interrogatory submitted by the Court.

It should be pointed out that the appellate court appendix prepared by the parties consisted of two printed volumes of testimony and one printed volume of exhibits. After oral argument, the appellate court requested that the entire transcript of the trial, some 1,500 pages of testimony, be sent to the court for its review. Nowhere in those 1,500 pages of testimony was there any evidence to support the jury's verdict.

The entire record indicates that Gold introduced no direct evidence of any fraudulent conduct on the part of architect Rucinski. In addition, there was no evidence that the Bank officials or Rucinski ever discussed the Brock Bill with respect to Gold's apartment complex and, finally, there was no evidence to show any fraudulent intent on the part of the architect to prepare an inaccurate report as to the quality of workmanship of the apartment project. With respect to the Brock Bill, the only evidence in the record indicates that the Brock Bill was enacted by Congress about the same time as the Bank refused to fund its permanent loan. Bank contends that the appellate court correctly found that such a fact, standing by itself, is "insufficient to support an inference that the Bank's architect inspected the apartment project with bad faith."

CONCLUSION

Respondent Bank contends that, in its Opinion, the appellate court disposes of Gold's reason for requesting this Court to grant a Petition For Writ Of Certiorari. Under the facts of this case, applying either the state or federal standard would result in a judgment n.o.v. for Bank. Accordingly, Respondent National Savings Bank of the City of Albany respectfully requests that Gold's Petition be denied.

Respectfully submitted,

S. Shepherd Tate
Lee L. Piovarcy
705 Union Planters Bank Building
Memphis, Tennessee 38103

Attorney for Respondent,
NATIONAL SAVINGS BANK
OF THE CITY OF ALBANY

MARTIN, TATE, MORROW & MARSTON, P.C.
of counsel